

should be held in contempt, the sanction for which should be dismissal of Mr. Peker's case.

April 14, 1997.

**OPINION AND ORDER ON
REARGUMENT**

KOELTL, District Judge:

In an Opinion and Order dated May 5, 1997, this Court adjudged the plaintiff, Mr. Peker, and his wife, Mrs. Peker, in contempt and dismissed this action with prejudice. The plaintiff now moves for reconsideration of the Opinion and Order pursuant to Local Rule 3(j).

[5] A motion for reargument pursuant to Local Rule 3(j) requires the moving party to demonstrate that the Court overlooked the controlling decisions or factual matters that were put before the Court in the underlying motion. *See Walsh v. McGee*, 918 F.Supp. 107, 110 (S.D.N.Y. 1996); *see also* Local Rule 3(j); *In re Houbigant*, 914 F.Supp. 997, 1001 (S.D.N.Y. 1996); *Bank Leumi Trust Co. of New York v. Istim, Inc.*, 902 F.Supp. 46, 48 (S.D.N.Y. 1995). Local Rule 3(j) is "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *Walsh*, 918 F.Supp. at 110; *see also United States v. Mason Tenders Dist. Council of Greater New York*, 909 F.Supp. 882, 889 (S.D.N.Y. 1995). The Court must not allow reargument to be a substitute for appealing a final judgment or to permit a party to reargue those issues already considered merely because a party does not like the outcome. *See Houbigant*, 914 F.Supp. at 1001; *Mason Tenders*, 909 F.Supp. at 889.

In this case, the plaintiff has not demonstrated that the Court overlooked either controlling decisions or factual matters that were put before the Court in Magistrate Judge Peck's Memorandum, which certified facts pursuant to 28 U.S.C. § 636(e) demonstrating the contempt of Mr. and Ms. Peker and recommended dismissal of the case as the appropriate sanction, in the transcript and audiotape of the relevant conference, in the hearing held by this Court on April 25, 1997, and in the two written submissions by

the plaintiff. Instead, the plaintiff simply disagrees with the conclusions reached by the Court. The motion for reconsideration is therefore without merit.

Accordingly, for the reasons stated above, the plaintiff's motion for reargument is denied.

SO ORDERED.



**APC COMMODITY CORPORATION
d/b/a Sunrise Commodity,
Plaintiff,**

v.

RAM DIS TICARET A.S., Defendant.

No. 96 Civil 9162 (JGK).

United States District Court,
S.D. New York.

May 19, 1997.

American importer of cargo of dried apricots from Turkey filed complaint in state court against shipper and obtained order of attachment of funds held in importer's New York bank as accounts receivable from shipper. After removal, importer filed complaint alleging that breached and repudiated its contract by refusing to ship certain containers called for by the contract. Shipper moved to dismiss complaint for lack of personal jurisdiction and to vacate state court's order of attachment. Importer cross-moved to confirm order of attachment. The District Court, Koeltl, J., held that: (1) importer made prima facie showing that district court had personal jurisdiction over shipper under section of New York long arm statute; (2) due process requirements and minimum contacts necessary for quasi-in-rem jurisdiction over funds held by importer's New York bank as accounts receivable from shipper were satis-

fied; and (3) under New York law, importer was entitled to order of attachment.

Defendant's motion denied; plaintiff's cross-motion granted.

1. Federal Courts ⇨97

District court has broad discretion in deciding how to proceed with a motion to dismiss for lack of personal jurisdiction, including conducting an evidentiary hearing. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

2. Federal Courts ⇨96

On motion to dismiss for lack of personal jurisdiction, when no evidentiary hearing has been held, plaintiff need only make a prima facie showing of personal jurisdiction over defendant, and the pleadings and affidavits are to be interpreted in the light most favorable to plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A..

3. Federal Courts ⇨417

Court sitting in diversity applies the law of the forum state in determining whether it has personal jurisdiction over defendant.

4. Courts ⇨12(2.15)

Under section of the New York long-arm statute conferring personal jurisdiction over nondomiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state," existence of some articulable nexus between the business transacted and the cause of action sued upon is essential. N.Y.McKinney's CPLR 302(a), par. 1.

5. Courts ⇨12(2.15)

Nondomiciliary "transacts business" within meaning of New York long arm statute when he purposefully avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws. N.Y.McKinney's CPLR 302(a), par. 1.

See publication Words and Phrases for other judicial constructions and definitions.

6. Courts ⇨12(2.15)

Under New York long arm statute, court may exercise jurisdiction over a nondomiciliary who contracts outside this New York to supply goods or services in New York so long as the cause of action arose out of that contract; jurisdiction may exist even when the goods are never shipped or supplied to New York, since key issue is whether nondomiciliary contracted and intended to send goods to New York. N.Y.McKinney's CPLR 302(a), par. 1.

7. Federal Courts ⇨86

American importer made prima facie showing that district court has personal jurisdiction over Turkish shipper of cargo of dried apricots under section of New York long arm statute by demonstrating that shipper conducted business in New York in conjunction with shipment, and that claim arose out of contract to supply goods to New York; shipper's bills of lading provided for New York as port of discharge, and such purposeful activity directed at New York was sufficient to confer personal jurisdiction pursuant to statute despite the fact that the two containers of apricots were ultimately shipped to Port Elizabeth, New Jersey. N.Y.McKinney's CPLR 302(a), par. 1.

8. Constitutional Law ⇨305(4.1)

Federal Courts ⇨76.5

Whether quasi-in-rem jurisdiction exists in a given case involves inquiry into presence or absence of constitutionally mandated minimum contacts. U.S.C.A. Const.Amend. 14.

9. Federal Courts ⇨76.5

Quasi-in-rem jurisdiction does not exist when the property serving as the jurisdictional basis has no relationship to the cause of action and there are no other ties among the defendant, the forum and the litigation

10. Constitutional Law ⇨305(4.1)

Federal Courts ⇨76.30

Due process requirements and minimum contacts necessary for quasi-in-rem jurisdiction over \$104,306.81 held by American importer's New York bank as accounts receivable of shipper were satisfied, notwithstanding shipper's contention that requirements were not met because the presence of

the funds in New York was fortuitous and the result of importer's rather than the shipper's actions; rather, funds were in New York pursuant to contract between the parties that called for a series of exchanges in New York, and funds held by bank represented a portion of proceeds of the contract at issue in the litigation. U.S.C.A. Const. Amend. 14.

11. Federal Courts ⇐409.1

In a case where jurisdiction is based on diversity of citizenship, federal court applies conflict of law principles of forum state.

12. Frauds, Statute of ⇐127

Under New Jersey law, written confirmation of an oral agreement between merchants establishes an enforceable contract where the recipient does not object within ten days. N.J.S.A. § 12A:2-201.

13. Attachment ⇐102, 111

Under New York law, American importer of cargo of dried apricots was entitled to order of attachment of funds held by importer's New York bank as accounts receivable of Turkish shipper; importer met its burden of showing probability of success on the merits and establishing grounds of attachment, despite shipper's contention that Turkish law applied to this action and that importer failed to demonstrate, under Turkish law, existence of contract and its right to recover under that contract.

Peter J. Pizzi, Connell, Foley & Geiser, Roseland, NJ, for Plaintiff.

John Reichman, Gold & Wachtel, New York City, for Defendant.

KOELTL, District Judge:

This is an action for damages arising out of a contract under which the defendant, Ram Dis Ticaret A.S., agreed to ship containers of dried apricots from Turkey to the plaintiff, APC Commodity Corporation d/b/a Sunrise Commodity, in the United States. The plaintiff alleges that the defendant breached and repudiated its contract with the plaintiff by refusing to ship certain containers called for by the contract.

The plaintiff initially filed its complaint in the New York State Supreme Court, New York County. On November 6, 1996, the plaintiff sought and obtained from the New York State court an *ex parte* order of attachment. This order of attachment was levied on \$104,306.81 held by the plaintiff's New York bank as amounts receivable for the defendant. On December 5, 1996, the defendant removed this action to this Court. Thereafter the plaintiff filed a complaint in this Court. The defendant now moves to dismiss the complaint for lack of personal jurisdiction and to vacate the state court's order of attachment. The plaintiff cross-moves to confirm the order of attachment.

I.

The plaintiff is a Delaware corporation with its principal place of business in Englewood Cliffs, New Jersey. (Compl. ¶ 1.) The plaintiff is in the business of importing food products for sale and distribution in the United States. The defendant is a corporation with its principal place of business in Istanbul, Turkey. (Compl. ¶ 2.) The defendant is in the business of selling and shipping food products from Istanbul and other ports of origin to the United States. The defendant does not have an office in the State of New York. (Erol Certification ¶ 5.)

The plaintiff alleges that beginning in May 1996, the defendant agreed to sell and the plaintiff agreed to buy a total of twenty-three container loads of dried apricots to be shipped from Istanbul, Turkey, to the Port of New York and New Jersey. (Compl. ¶ 3.) On May 23, 1996, the plaintiff sent to the defendant a facsimile confirming the transaction and the plaintiff's agreement to buy sixteen containers from the defendant as agents for Sunsweet, and ten containers for itself. (Compl. ¶ 4 & Ex. B; Dicker Aff. ¶ 9 & Ex. A.) On May 24, 1996, the defendant sent to the plaintiff a facsimile clarifying some of the terms of the transaction. (Compl. ¶ 4 & Ex. C; Dicker Aff. ¶ 10 & Ex. B.)

The plaintiff alleges that on or about October 16, 1996, the defendant shipped two containers of dried apricots to the plaintiff from Istanbul. (Dicker Supplemental Aff. ¶ 9.) Al-

though all the correspondence referred to New York as the port of discharge, (Dicker Aff. Ex. A; Dicker Supplemental Aff. Ex. L-O), the containers were shipped to Port Elizabeth, New Jersey. (Erol Certification ¶ 9.) On October 24, 1996, the defendant's bank in Istanbul, The Chase Manhattan Bank, N.A. ("Chase-Istanbul"), sent to the plaintiff's New York bank, Rabobank Nederland ("Rabobank"), the defendant's invoices, bills of lading, certificates of origin, and phytosanitary certificates for the two containers. (Dicker Supplemental Aff. ¶ 10 & Exs. P, Q.) In exchange for the documents, Chase-Istanbul instructed Rabobank to draw the invoice amount from the plaintiff's Rabobank account and to transfer it to an account at Chase Manhattan Bank in New York ("Chase-New York").

The plaintiff alleges that the defendant shipped only two of the ten containers intended for the plaintiff and three of the remaining thirteen containers. (Compl. ¶ 7.) The plaintiff alleges that as a result of the defendant's failure to ship the remaining containers, the plaintiff has been forced to purchase replacement merchandise in order to meet its supply obligations to its customers and has incurred damages of about \$348,000. (Dicker Supplemental Aff. ¶ 15.) On November 6, 1996, the plaintiff sought and obtained from the New York Supreme Court, New York County, an *ex parte* order of attachment that was levied on \$104,306.81 held by Rabobank, which represents amounts receivable by the defendant for two containers shipped by the defendant to the plaintiff.

II.

[1, 2] The defendant moves to dismiss the complaint under Fed.R.Civ.P. 12(b)(2) on the basis that this Court does not have personal jurisdiction over the defendant. A district court has "broad discretion" in deciding how to proceed with a motion to dismiss for lack of personal jurisdiction, including conducting an evidentiary hearing. *See CutCo Indus. v. Naughton*, 806 F.2d 361, 364 (2d Cir.1986); *International Customs Assocs., Inc. v. Ford*

Motor Co., 893 F.Supp. 1251, 1258-59 (S.D.N.Y.1995). Because there has not been an evidentiary hearing in this case, the plaintiff need only make a prima facie showing of personal jurisdiction over the defendant, and the pleadings and affidavits are to be interpreted in the light most favorable to the plaintiff. *See A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir.1993); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir.1985); *CT Chem. (USA) Inc. v. Horizons Int'l, Inc.*, 106 F.R.D. 518, 519 (S.D.N.Y.1985).

[3, 4] A court sitting in diversity applies the law of the forum state in determining whether it has personal jurisdiction over a defendant. *See CutCo*, 806 F.2d at 365; *Hoffritz*, 763 F.2d at 57; *International Customs Assocs.*, 893 F.Supp. at 1259. The plaintiff argues that this Court has personal jurisdiction pursuant to the New York long-arm statute. *See* N.Y. C.P.L.R. § 302(a)(1).¹ N.Y. C.P.L.R. § 302(a)(1) provides in relevant part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state. . . .

N.Y. C.P.L.R. § 302(a)(1). Under this provision, "the existence of some articulable nexus between the business transacted and the cause of action sued upon" is essential. *McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645, 419 N.E.2d 321 (1981); *see also CutCo*, 806 F.2d at 365.

[5] Under the first prong of § 302(a)(1) jurisdiction, transacting business "has been interpreted to require a certain quality, rather than a specific quantity, of contacts with New York." *Broad Horizons, Inc. v. Central Crude Ltd.*, No. 94 Civ. 1593, 1994 WL 623075, at *2 (S.D.N.Y. Nov. 9, 1994) (citation omitted); *see also International Customs Assocs.*, 893 F.Supp. at 1259; *Cavalier Label*

N.Y. C.P.L.R. § 301.

1. The plaintiff does not argue that the Court has "general jurisdiction" over the defendant under

Cite as 965 F.Supp. 461 (S.D.N.Y. 1997)

Co., Inc. v. Polytam, Ltd., 687 F.Supp. 872, 876 (S.D.N.Y.1988). "A nondomiciliary transacts business under CPLR § 302(a)(1) when he purposefully avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." *CutCo*, 806 F.2d at 365 (internal quotations and citations omitted). "Whether or not the contacts are of the appropriate nature must be determined by an analysis of the totality of the circumstances." *United States Theatre Corp. v. Gunwyn/Lansburgh Ltd. Partnership*, 825 F.Supp. 594, 596 (S.D.N.Y.1993) (citations omitted)

[6] Under the second prong of § 302(a)(1) jurisdiction, "New York courts may exercise jurisdiction over a nondomiciliary who contracts outside this State to supply goods or services in New York so long as the cause of action arose out of that contract." *Anderson Dev. Corp. v. Isoreg Corp.*, 154 A.D.2d 859, 860, 546 N.Y.S.2d 720, 721 (3d Dep't 1989); see also *Cavalier*, 687 F.Supp. at 877. Jurisdiction may exist even when the goods are never shipped or supplied to New York. See *Laumann Mfg. Corp. v. Castings USA, Inc.*, 913 F.Supp. 712, 716 (E.D.N.Y.1996); *En Vogue v. UK Optical Ltd.*, 843 F.Supp. 838, 843 (E.D.N.Y.1994); *Alan Lupton Assocs., Inc. v. Northeast Plastics, Inc.*, 105 A.D.2d 3, 6, 482 N.Y.S.2d 647, 650 (4th Dep't 1984). "The key issue is that the nondomiciliary contracted and intended to send goods to New York." *Laumann*, 913 F.Supp. at 717.

[7] In this case, the plaintiff has made a prima facie showing that this Court has personal jurisdiction over the defendant under both prongs of N.Y. C.P.L.R. § 302(a)(1). First, the defendant transacted business in New York, and the plaintiff's claim against the defendant arises out of that business activity. See *CutCo*, 806 F.2d at 365; *International Customs Assocs.*, 893 F.Supp. at 1259. The plaintiff alleges that its president met with the defendant's General Manager, Metin Gurbilek, three times between December 1995 and July 1996 and discussed the specifics of the pending transactions. (Dicker Supplemental Aff. ¶¶ 4-5.) Consistent with the usual course of dealing between the

defendant and the plaintiff, the defendant caused Chase-Istanbul to send by international courier to Rabobank in New York documents of title and certificates of origin and sanitation for the two containers. (Dicker Aff. ¶ 4; Dicker Supplemental Aff. ¶¶ 6, 10-11 & Exs. P, Q.) Based upon the physical delivery of these documents of title to New York, Chase-Istanbul instructed Rabobank to wire to an account at Chase-New York the money owed for the merchandise. The defendant purposefully availed itself of the privilege of conducting activities in New York that were critical to the transactions at issue in this case. These activities are sufficient for personal jurisdiction.

Second, the plaintiff has demonstrated that its claim arises out of a contract to supply goods to New York. The plaintiff's May 23, 1996 facsimile to the defendant that confirmed the parties' agreement provided for "C & F NY," (Dicker Aff. Ex. A), the defendant's invoices sent to Rabobank provided for "CFR / New York," (Dicker Supplemental Aff. Exs. L, M), and the defendant's bills of lading sent to Rabobank provided for New York as the port of discharge, (Dicker Supplemental Aff. Ex. N, O). "That purposeful activity directed at New York is sufficient to confer personal jurisdiction pursuant to the statute" despite the fact that the two containers of apricots were ultimately shipped to Port Elizabeth, New Jersey. *En Vogue*, 843 F.Supp. at 844.

[8, 9] The plaintiff also asserts that quasi-in-rem jurisdiction exists because the \$104,306.81 held by Rabobank directly relates to the transaction in question. "Whether quasi-in-rem jurisdiction exists in a given case involves an inquiry into the presence or absence of the constitutionally mandated minimum contacts." *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 72, 476 N.Y.S.2d 64, 67, 464 N.E.2d 432 (1984). "Under that standard, due process 'requires . . . that in order to subject a defendant to a judgment . . . , if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Majique Fashions, Ltd. v.*

Warwick & Co. Ltd., 67 A.D.2d 321, 325–26, 414 N.Y.S.2d 916, 920 (1st Dep't 1979) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)); see also *Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683 (1977). "Inherent in the analysis . . . is consideration of the purposeful acts of the non-domiciliary giving rise to the presence or lack of a reason to expect to be haled before the state-court, the forum." *Majique*, 67 A.D.2d at 326, 414 N.Y.S.2d at 920 (citation omitted). Quasi-in-rem jurisdiction thus does not exist "when the property serving as the jurisdictional basis has no relationship to the cause of action and there are no other ties among the defendant, the forum and the litigation. . . ." *Banco Ambrosiano*, 62 N.Y.2d at 71, 476 N.Y.S.2d at 67, 464 N.E.2d 432; see also *Johnson v. United Overseas Bank*, No. 95 Civ. 9508, 1997 WL 79871, at *2 (S.D.N.Y. Feb.25, 1997).

[10] The defendant argues that the due process requirements and minimum contacts necessary for quasi-in-rem jurisdiction have not been met because the presence of the \$104,306.81 in New York was fortuitous and was the result of the plaintiff's rather than the defendant's actions. See *Nemetsky v. Banque de Developpement de la Republique du Niger*, 64 A.D.2d 694, 695, 407 N.Y.S.2d 556, 557–58 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 962, 425 N.Y.S.2d 277, 401 N.E.2d 388 (1979). However, the plaintiff has demonstrated that the funds in question are not in New York fortuitously. They are in New York pursuant to a contract between the parties that called for a series of exchanges in New York, which give rise to the presence of a reason for the defendant to expect to be haled into court in New York. As explained above, pursuant to an agreement between the parties, the defendant caused certain documents pertaining to two of the ten containers to be delivered to Rabobank in New York with instructions that the invoice amount be transferred to an account at Chase–New York. The attached funds held by Rabobank represent a portion of the proceeds of the contract at issue in this litigation. These contacts satisfy the minimum contacts standard, and the dictates of due process are not offended by requiring the defendant to defend this

claim in New York. See *Banco Ambrosiano*, 62 N.Y.2d at 73, 476 N.Y.S.2d at 68, 464 N.E.2d 432; *Majique*, 67 A.D.2d at 326–27, 414 N.Y.S.2d at 920–21.

Accordingly, because this Court has personal jurisdiction over the defendant and because quasi-in-rem jurisdiction exists, the defendant's motion to dismiss the complaint for lack of personal jurisdiction is denied.

III.

The defendant moves to vacate the state court's order of attachment, and the plaintiff cross-moves to confirm the order of attachment. Pursuant to Fed.R.Civ.P. 64, orders of attachment are governed by New York law. New York law provides that "[a]n order of attachment may be granted in any action . . . when . . . 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state. . . ." N.Y. C.P.L.R. § 6201. The plaintiff is required to show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." N.Y. C.P.L.R. § 6212(a). "Upon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits." N.Y. C.P.L.R. § 6223(b).

The defendant argues that the attachment should be vacated because the plaintiff has not met its burden of showing probability of success on the merits and establishing the grounds of attachment, including that the amount demanded from the defendant exceeds all counterclaims. The defendant contends that Turkish law applies to this action and that the plaintiff has failed to demonstrate, under Turkish law, the existence of a contract and the plaintiff's right to recover under that contract. The plaintiff asserts that either New York or New Jersey law should apply to this action and that it has

demonstrated that it is entitled to recover under both.

[11] In a case where jurisdiction is based on diversity of citizenship, a federal court applies the conflict of law principles of the forum state. See *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941). In *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2d Cir.1996), cert. denied, — U.S. —, 117 S.Ct. 959, 136 L.Ed.2d 845 (1997), the Court of Appeals for the Second Circuit explained the approach used by New York courts:

In contract cases, New York courts now apply a "center of gravity" or "grouping of contacts" approach. Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis.

Id. at 1030-31 (citations omitted); see also *Kalish & Rice, Inc. v. Regent Air Corp.*, 624 F.Supp. 173, 176 (S.D.N.Y.1985).

In this case, New Jersey has the most significant contacts. The contract for the twenty-three containers was confirmed in writing by facsimiles written in and sent from New Jersey. The first two containers were delivered to Port Elizabeth, New Jersey. Furthermore, the plaintiff's principal place of business is in Englewood Cliffs, New Jersey. Under these facts, the plaintiff has demonstrated a likelihood that New Jersey law will be applied.

2. The defendant argues that it was justified in failing to ship any further products to the plaintiff because the plaintiff failed to comply with the terms of the purported contract. The defendant alleges that the plaintiff never provided notice six weeks prior to shipment of which size apricots it wanted. However, three facsimiles sent in July

[12] Under New Jersey law, the written confirmation of an oral agreement between merchants establishes an enforceable contract where the recipient does not object within ten days. See N.J. Stat. Ann. § 12A:2-201; see also *Trilco Terminal v. Prebilt Corp.*, 167 N.J.Super. 449, 452, 400 A.2d 1237, 1239 (1979), aff'd, 174 N.J.Super. 24, 415 A.2d 356 (N.J.Super.Ct.App.Div.1980). The plaintiff argues that in May 1996, it reached an oral agreement with the defendant for the purchase and sale of a total of twenty-three containers of apricots. This oral agreement was then confirmed in writing by the plaintiff's May 23, 1996 facsimile, which discussed the price, quantity, and delivery of the containers. The defendant did not object to the terms of the agreement in its May 24, 1996 facsimile; instead, it acknowledged receipt of the plaintiff's May 23, 1996 facsimile and clarified certain terms in that communication. Accordingly, the plaintiff has established the likely existence of an enforceable contract under New Jersey law.²

The defendant also argues that it was justified in refusing to ship further containers to the plaintiff because the plaintiff owed it more than \$50,000 with respect to three other shipments of goods. (Erol Certification ¶ 16 & Ex. C.) The plaintiff contends that it only owes the defendant approximately \$28,161 for those shipments. In any event, the amount of the plaintiff's alleged damages—in excess of \$340,000—far exceeds the attached funds held by Rabobank and any counterclaim asserted by the defendant.

[13] Accordingly, because the plaintiff has demonstrated the probability that it will succeed on the merits, the defendant's motion to vacate the state court's order of attachment is denied, and the plaintiff's cross-motion to confirm the order of attachment is granted.³

1996 demonstrate that the plaintiff provided notice of size. (Dicker Aff. Exs. D-F.)

3. Because the order of attachment is confirmed, the defendant's current application for attorneys fees pursuant to N.Y. C.P.L.R. § 6212(e) is denied.

CONCLUSION

For the reasons explained above, the defendant's motion to dismiss the complaint and to vacate the state court's order of attachment is **denied**. The plaintiff's cross-motion to confirm the order of attachment is **granted**.

SO ORDERED.



Sammy SANTIAGO, Plaintiff,

v.

**Bryan SEMENZA, Supervisory Deputy
U.S. Marshal, Defendant.**

No. 95 Civil 4706 (JGK).

United States District Court,
S.D. New York.

May 19, 1997.

Pretrial detainee brought action against United States marshal who struggled with detainee during commotion in holding cell area, claiming excessive force. On defendant's motion for summary judgment, the District Court, Koeltl, J., held that: (1) marshal was not liable for alleged use of excessive force, and (2) marshal had qualified immunity.

Motion granted.

1. Constitutional Law ⇨272(2)

Traditional test for determining whether prison official has used excessive physical force in violation of due process clause is whether conduct at issue shocks the conscience; in determining whether constitutional line has been crossed, court must look to such factors as need for application of force, relationship between need and amount of force that was used, extent of injury inflicted, and whether force was applied in good faith effort to maintain or restore discipline or

maliciously and sadistically for very purpose of causing harm. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇨262

Attempted blow to pretrial detainee by prison official does not rise to level of due process violation. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇨262

Prisons ⇨13(4)

United States marshal who struggled with pretrial detainee during commotion in holding cell area was not liable to detainee for use of excessive force in violation of due process; marshal's actions were necessary to secure detainee, safeguard other marshals, and restore security to holding cell area, given fact that "mad commotion" was occurring and that detainee had slipped his handcuffs from behind his back so that they were in front of him, and there was no indication that marshal's actions, which may have been cause of detainee's bruise or scratch, were disproportionate to situation. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇨262

Prisons ⇨13(4)

United States marshals' decision to bring pretrial detainee into holding cell area during midst of "mad commotion" resulting in detainee's struggle with another marshal could not be basis for finding of due process violation. U.S.C.A. Const.Amend. 14.

5. Officers and Public Employees ⇨114

Qualified immunity shields government officials from liability for civil damages when they are sued in their personal capacity as result of their performance of discretionary functions, and serves to protect officials from burdens of costly, insubstantial lawsuits.

6. Civil Rights ⇨214(2)

Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.